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IN THE

Supreme Court of the United States

DEREK CUNNINGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), which held in the initial sentencing context that the United States Sentencing Guidelines are advisory only, apply with equal force to sentence reductions under 18 U.S.C. § 3582(c)(2) such that a district court has discretion to reduce the defendant's term of imprisonment below the Guideline range?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Derek Cunningham, Norman Thomas and Respondent the United States. Mr. Cunningham is the sole Petitioner here.

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INTRODUCTION

The Seventh Circuit's decision below holding that when reducing a defendant's sentence pursuant to 18 U.S.C. § 3582(c)(2) district courts "do not have the authority to reduce the defendant's sentence beyond the retroactive Guidelines amendment range," *United States v. Cunningham*, 554 F.3d 703, 709 (7th Cir. 2009), is inconsistent with this Court's remedial opinion in *United States v. Booker*, 543 U.S. 220, 245 (2005), which made the United States Sentencing Guidelines "effectively advisory." Joining several other courts of appeals, the Seventh Circuit is in direct conflict with the Ninth Circuit, thereby deepening a circuit divide over an important and recurring issue of federal law. As indicated by the recent flurry of decisions from the courts of appeals on the issue of *Booker*'s applicability to resentencing proceedings, the circuits are very much at sea in grappling with the scope of *Booker*; thus, this Court's guidance is needed at this time.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Pet App. 13a, is published as *United States v. Thomas*, 566 F. Supp. 2d 830 (N.D.Ill. 2008). The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court, Pet. App. 1a, can be found at 554 F.3d 703 (7th Cir. 2009).

JURISDICTION

The Court of Appeals issued its decision on February 4, 2009. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 3582(c)(2) of Title 18 of the United States Code provides: "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

Section 1B1.10(b)(1) of the United States Sentencing Guidelines provides: "In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time that defendant was sentenced."

Section 1B1.10(b)(2)(A) of the Guidelines provides: "Except as provided in subdivision (B) [not relevant here], the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection."

STATEMENT

On August 18, 2005, Derek Cunningham ("Petitioner")[1] pleaded guilty in the United States District Court for the Northern District of Illinois to conspiring to possess with intent to distribute in excess of 50 grams of cocaine base ("crack"), a violation of 21 U.S.C. § 846. The district court found Petitioner to have a Base Offense Level of 29 and the lowest Criminal History Category; these factors yielded a United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") range of 87 to 108 months. Pet. App. 2a. The court sentenced Petitioner to 87 months. *Id.* In 2007 the United States Sentencing Commission ("Sentencing Commission" or "Commission") promulgated Amendment 706, U.S. Sentencing Guidelines Manual app. C, at 1156 (2008), which "reduces the base offense level associated with each quantity of crack by two levels." *Kimbrough v. United States*, 128 S. Ct. 558, 569 (2007). The Commission also listed Amendment 706 in U.S.S.G. § 1B1.10(c) as an amendment that could be applied retroactively to previously imposed sentences. On June 27, 2008, Petitioner filed a motion in the district court under 18 U.S.C. § 3582(c)(2) for a resentencing. Pet. App. 2a. Section 3582(c)(2) affords district courts the discretion to resentence prisoners "who [have] been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and made retroactive. 18 U.S.C. § 3582(c)(2).

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[1] Norman Thomas was Petitioner's codefendant below; the courts below ruled on their separate § 3582(c)(2) motions in the same opinion. Mr. Thomas is not party to this Petition.

On July 17, 2008, pursuant to Amendment 706, the district court agreed to reduce Petitioner's Base Offense Level from 29 to 27. Pet. App. 2a, 15a. Given Petitioner's Criminal History Category I designation, this Base Offense Level yielded a sentencing range of 70 to 87 months; the district court elected to lower Petitioner's sentence to 70 months. Pet. App. 15a. Petitioner, citing this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which "ma[d]e the Guidelines system advisory," *id.* at 247, argued that the district court could further reduce his sentence below the amended Guidelines. However, reading *Booker* to apply only to increases in sentences and not to sentence reductions under § 3582(c)(2), the district court held it could not, consistent with U.S.S.G. § 1B1.10(b)(2)(A), reduce Petitioner's sentence below the range set by the amended Guidelines. Pet. App. 14a, 20a. On July 30, 2008, Petitioner appealed the district court's ruling to the United States Court of Appeals for the Seventh Circuit. Pet. App. 3a.

On appeal, Petitioner argued that the effect of this Court's decision in *Booker* was to render the Guidelines advisory for purposes of a resentencing under § 3582(c)(2) as well as an original sentencing and, therefore, the district court wrongly held it lacked discretion to consider reducing his sentence below the amended Guideline range. Petitioner relied on the Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), which held that *Booker* rendered the Guidelines advisory also in a § 3582(c)(2) resentencing. On February 4, 2009, the court of appeals denied Petitioner's appeal in *United States v. Cunningham*, 554 F.3d 703 (7th

Cir. 2009); Pet. App. 1a.[2] The panel ruled that *Booker* does not "render[] the limits set by the Sentencing Commission for § 3582(c)(2) proceedings advisory." 554 F.3d at 707; Pet. App. 9a. The Seventh Circuit indicated it declined to follow *Hicks* and would "side with the majority of courts" rejecting the *Hicks* reading. 554 F.3d at 709; Pet. App. 12a.

The Seventh Circuit's analysis began with an examination of the "substantive" and "remedial" opinions of *Booker*. According to the Seventh Circuit, this Court, in its "substantive opinion," found that the Sentencing Guidelines, as written, violated the Sixth Amendment because "the sentencing court rather than the jury found facts that established the mandatory guideline range." 554 F.3d at 706; Pet. App. 7a. The "remedial opinion" then cured this violation by severing and excising "the provision of the federal sentencing statute that [made] the Guidelines mandatory." *Booker*, 543 U.S. at 245. Neither opinion, according to the appeals court, controlled here. In the case of a § 3582(c)(2) resentencing, the panel reasoned, the "constitutional defect addressed by *Booker* is simply not implicated" because § 3582(c)(2) cannot lead to a higher sentence. Pet. App. 8a.

"Despite th[e] broad language" of *Booker*'s remedial opinion, the Seventh Circuit offered four reasons why the remedial opinion did not apply to a § 3582(c)(2) resentencing. 554 F.3d at 707; Pet. App. 9a. First, the Seventh Circuit believed that this Court in *Booker* sought to avoid turning the Guidelines into "a one way lever" giving district

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[2] The panel consisted of Judges Flaum, Posner, and Wood.

courts too little freedom to increase sentences and too much freedom to decrease sentences. 554 F.3d at 707; Pet. App. 9a. This concern was presumably not present in § 3582(c)(2) proceedings because "Congress clearly intended § 3582(c)(2)" to only "reduce" sentences. 554 F.3d at 707; Pet. App. 9a. Second, the panel added, *Booker* sought to avoid the "administrative complexities" that would arise from leaving the Sentencing Guidelines mandatory in some contexts while advisory in others. 554 F.3d at 707; Pet App. 9a. For the Seventh Circuit, this administrative consideration cut the other way: making the Guidelines advisory in a § 3582(c)(2) resentencing would in fact increase administrative complexity because it would allow for "essentially . . . a full resentencing upon a section 3582(c)(2) motion." 554 F.3d at 707; Pet App. 9a.

The third reason the appeals court gave for *Booker*'s inapplicability to § 3582(c)(2) resentencings was that Congress located the district court's resentencing and original sentencing authority in different statutes, 18 U.S.C. § 3582(c) and 18 U.S.C. § 3553, respectively. Section 3582(c) prevents a court from "modify[ing] a term of imprisonment once it has been imposed except" through a § 3582(c)(2) motion that "is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Section 3582(c)'s reference to the Commission's policy statements expressed, in the panel's view, a Congressional intention to treat the policy statements as "part of the statute." 554 F.3d at 708; Pet App. 10a. Therefore, since the Commission, through U.S.S.G. § 1B1.10(b)(2)(A), made the Sentencing Guidelines mandatory in § 3582(c)(2) resentencings, the statute required

mandatory application of the Guidelines in those proceedings.

Finally, the Seventh Circuit cited the argument, made by the Eighth and Tenth Circuits, that the different statutory bases for original sentences, § 3553, and resentencings, § 3582(c), help separate § 3582(c) from *Booker*'s remedial opinion. *See* 554 F.3d at 707-08 n.3; Pet. App. 10a n.3; *see also United States v. Starks*, 551 F.3d 839, 842 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833, 840-41 (10th Cir. 2008). It was material to the court below that while § 3553 was "partially excised" in *Booker*, no mention was made of § 3582(c). 554 F.3d at 707; Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR AND DEVELOPED CONFLICT AMONG THE CIRCUITS OVER *BOOKER*'S APPLICABILITY TO § 3582(c)(2) RESENTENCING PROCEEDINGS

The court below, in agreement with the courts of appeals for the First, Fourth, Eighth, Tenth, and Eleventh Circuits, is in explicit and direct conflict with the Ninth Circuit over *Booker*'s applicability to § 3582(c) proceedings. *Compare Cunningham*, 554 F.3d 703 (7th Cir. 2009), *United States v. Fanfan*, --- F.3d ---, 2009 WL 531281 (1st Cir. 2009); *United States v. Melvin*, --- F.3d ---, 2009 WL 236053 (11th Cir. 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009); *United States v. Rhodes*, 549 F.3d

833 (10th Cir. 2008), *with United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007).[3]

In *Hicks*, the Ninth Circuit held that the Sentencing Guidelines are advisory both for a resentencing under § 3582(c)(2) as well as an original sentencing: *Booker* "explicitly stated that, 'as by now should be clear, [a] mandatory system is no longer an open choice.'" 472 F.3d at 1170, *quoting Booker*, 543 U.S. at 263.[4] Accepting many of the same arguments that were found unpersuasive in the decision below, *Hicks* reasoned that this Court had "rejected the argument that the Guidelines might remain mandatory in some cases but not in others." 472 F.3d at 1171-72, *citing Booker*, 543 U.S. at 263-66. Nor could a Sentencing Commission policy statement displace the central tenet of *Booker*. "To the extent that the policy statements would have the effect of

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[3] Not all judges in these Circuits have agreed with these decisions. Judge Bye of the Eighth Circuit noted that the Sentencing Guidelines, specifically § 1B1.10(b)(2)(A), "cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all of the guidelines, advisory under *United States v. Booker*." *United States v. Harris*, --- F.3d ---, 2009 WL 465945, at *2 (8th Cir. 2009) (Bye, J., concurring in judgment). Judge McKay of the Tenth Circuit disagreed with his Circuit's ruling in *Rhodes*. *See United States v. Pedraza*, 550 F.3d 1218, 1222 (10th Cir. 2008) (McKay, J., dissenting).

[4] Although the Fifth and D.C. Circuits have not ruled on this issue, district courts in those circuits have adopted the *Hicks* approach of the Ninth Circuit. *See United States v. Blakely*, 2009 WL 174265, at *6 (N.D. Tex. 2009) ("the Court disagrees with the Government's position and follows the line of reasoning in *Hicks*"); *United States v. Ragland*, 568 F. Supp. 2d 19, 24 (D.D.C. 2008) ("this Court finds the reasoning of *Hicks* persuasive").

making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void" after *Booker*. 472 F.3d at 1172.

Given the number of recent appeals court decisions on the issue presented here, this Court should expect to receive numerous petitions presenting either the same or a similar question. Of these petitions, the Court should grant this petition to resolve the question presented because the Seventh Circuit's opinion below offers a comprehensive, cogently reasoned (though ultimately flawed) account of the considerations that have led to this persisting conflict among the courts of appeals over *Booker*'s applicability to resentencing proceedings.

II. THE ISSUE PRESENTED IS A RECURRING ISSUE OF FEDERAL LAW

The question of whether *Booker* renders the Sentencing Guidelines advisory in § 3582(c)(2) resentencings is a recurring one. A federal prisoner can file a § 3582(c)(2) petition when three conditions are met: (1) the Guidelines provisions under which the prisoner was sentenced have "subsequently been lowered"; (2) the amended provisions would produce a lower "term of imprisonment" for the prisoner than the earlier provisions; and (3) the Commission makes the amendment retroactive under § 1B1.10(c) of the Guidelines. 18 U.S.C. § 3582(c)(2). When a future Guidelines amendment meets these three criteria, affected prisoners will file § 3582(c)(2) motions. In each of these § 3582(c)(2) proceedings the district court will have to decide whether it can resentence the prisoner to a range below that of the amended Guidelines.

The Sentencing Commission is likely to continue promulgating amendments to the Guidelines in the future. In the past twenty-one years, the Sentencing Commission has issued twenty-six retroactive amendments that satisfy these three requirements. *See* U.S.S.G. § 1B1.10(c). Eight of these retroactive amendments have resulted in prisoners successfully reducing their sentences under § 3582(c)(2).[5] The question of *Booker*'s applicability

[5] Besides Amendment 706, the other amendments are: (i) Amendment 379 modified the Sentencing Guidelines for the crime of failing to file a currency and monetary instrument report. *See, e.g., United States v. Park*, 951 F.2d 634 (5th Cir. 1992) (holding that Amendment 379 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (ii) "Unlawful possession of a weapon" was removed as a "crime of violence for the purposes" of sentencing enhancements by Amendment 433. *See, e.g., United States v. Beckley*, 30 F.3d 134 (6th Cir. 1994) (holding that Amendment 433 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (iii) Amendment 484 excluded "materials that must be separated from the controlled substance before the controlled substance can be used" from counting towards the weight of the controlled substance. *See, e.g., United States v. Turner*, 59 F.3d 481 (4th Cir. 1995) (holding that Amendment 484 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (iv) With Amendment 488 the Commission cured "unwarranted disparit[ies]," in sentencing for LSD related crimes, caused by wide variations in "the weights of LSD carrier media." *See, e.g., United States v. Kirby*, 34 F.3d 1077 (10th Cir. 1994) (holding that Amendment 488 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (v) The Sentencing Commission, through Amendment 505, lowered the maximum offense level that could be incurred for mere drug possession. *See, e.g., United States v. Bines*, 112 F.3d 517 (9th Cir. 1997) (holding that Amendment 505 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (vi) Amendment 516 lowered from one kilogram to one hundred grams the amount of marijuana to which a marijuana plant was said to be equivalent. *See, e.g., United States v. Mihm*, 134 F.3d 1353 (8th Cir. 1998) (holding that Amendment 516 entitled the prisoner to a reduced sentence

to § 3582(c)(2) resentencing theoretically could have appeared in § 3582(c)(2) proceedings based on any of these amendments. However, since *United States v. Booker* was decided in 2005, the issue has appeared thus far only in litigation surrounding amendments 599 and 706. *See Hicks*, 472 F.3d 1167 (amendment 599); *Starks*, 551 F.3d 839 (amendment 706).

Nor have federal courts seen the last § 3582(c)(2) motion based on Amendment 706. Since its implementation in 2007, Amendment 706 has resulted in significant litigation for the district courts; 12,723 federal prisoners have won sentence reductions in § 3582(c)(2) resentencings.[6] There are likely more to come. According to the Sentencing Commission, "in many districts, contested" § 3582(c)(2) motions "have not been decided by the court."[7] In many of these cases the district judge will be confronted with the question of whether to reduce the sentence below the amended Guideline range. Without guidance from this Court, the answer to this question will turn on which circuit the district court sits in.

(continued...)

under § 3582(c)(2)). (vii)The extent to which a conviction under 18 U.S.C. § 924(c) made the defendant eligible for weapon-base sentence enhancements was reduced by Amendment 599. *See, e.g., United States v. Hayes*, 298 F. App'x 888 (11th Cir. 2008) (holding that Amendment 599 entitled the prisoner to a reduced sentence under § 3582(c)(2)).

[6] United States Sentencing Commission, *Crack Cocaine Retroactivity Data Report*, at 4 (2009), *available at* http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Data_Report_13_February_09.pdf ("Retroactivity Data Report").

[7] Retroactivity Data Report at 3.

III. THE SEVENTH CIRCUIT'S READING IS CONTRARY TO *BOOKER*

A. *Booker* Requires A Unitary Application of the Guidelines

After concluding that the Federal Sentencing Guidelines conflict with the Sixth Amendment's jury trial requirements, *Booker*'s remedial opinion resolved the constitutional conflict by making the Guidelines advisory rather than mandatory. Specifically, by severing and excising the provisions of United States Code, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), that made the Guidelines mandatory, *Booker*'s remedial opinion "makes the Guidelines effectively advisory." *Booker*, 543 U.S. at 245. After *Booker*, a sentencing court is still required to "consider Guidelines ranges . . . but is permit[ted] . . . to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." *Id.*[8]

Booker's remedial opinion prohibited mandatory application of the Guidelines without carving out any exceptions, including any based on

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[8] This Court has subsequently reaffirmed the general holding of Booker on multiple occasions. *See, e.g.*, *Kimbrough*, 128 S. Ct. at 570 (affirming that "while the statute still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well'") (internal citations omitted); *Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) ("*Booker* is now settled law and must be accepted as such") (Stevens J., concurring). The Court has also spoken specifically on the advisory nature of the cocaine Guidelines: "under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only." *Kimbrough*, 128 S. Ct. at 564. *See also Spears v. United States*, 129 S. Ct. 840, 843-44 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines").

distinctions the Seventh Circuit attempts to draw below. Nothing in *Booker*'s language left open the possibility that the Guidelines would remain mandatory in some contexts while merely advisory in others. As the remedial opinion states, "we repeat, given today's constitutional holding, [a mandatory Guideline system] is not a choice that remains open." 543 U.S. at 265. Contrary to the Seventh Circuit's position, *Booker* rendered the Guidelines advisory in all contexts; thus, its holding clearly applies to § 3582(c)(2) proceedings.

Booker in fact rejected the bifurcated conception of the Guidelines the Seventh Circuit adopts below. When the Government in *Booker* suggested that courts should regard the Guidelines as advisory in "any case in which the Constitution prohibits" and mandatory in all other situations, the Court held that position to be untenable: "we do not see how it is possible to leave the Guidelines as binding in other cases." 543 U.S. at 266. Among the reasons given for its conclusion was that "the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences." *Id.* (emphasis in original).[9] Presented with the

[9] In an *amicus* brief filed in *Booker*, Senators Orrin Hatch (R-Utah), Edward M. Kennedy (D-Massachusetts) and Dianne Feinstein (D-California) argued that Congress intended a unitary system. *See* Brief for the Honorable Orrin G. Hatch *et al.* as *Amici Curiae* in Support of Petitioner 21-22, *United States v. Booker*, 543 U.S. 220 (2004) (Nos. 04-104 & 04-105) ("Congress intended the federal sentencing guidelines to be applied as a cohesive and integrated whole. . . . Attempting to apply the sentencing guidelines in a piecemeal fashion . . . would be inconsistent with the 'systematized sentencing system'

option of establishing a bifurcated system, the Court made a reasoned decision to adopt a unitary conception of the Guidelines.

B. The Seventh Circuit's Reasoning is Clearly Flawed

The Seventh Circuit's arguments favoring the mandatory application of the Guidelines to § 3582(c)(2) proceedings are well-articulated and comprehensive but ultimately unpersuasive. Accepting its position requires the Court to revisit a central part of *Booker*'s remedial rationale without good reason for doing so. To the extent other courts agree with the Seventh Circuit's reasoning in whole or in part, this reflects the fact that the Circuits are at sea in grappling with the scope of *Booker*'s remedial opinion, reaching to draw distinctions and find exceptions where none exist.

The Seventh Circuit implies that because *Booker* excised only 18 U.S.C. §§ 3553(b)(1) and 3742(e), *Booker* did not reach § 3582(c)(2) proceedings. 554 F.3d at 707-08 n.3; Pet. App. 10a n.3, *citing Starks*, 551 F.3d at 842; *Rhodes*, 549 F.3d at 840-41. This is a red herring because § 3582(c)(2) did not contain language rendering the amended Guidelines mandatory at the time *Booker* was decided. Specifically, U.S.S.G. § 1B1.10(b)(2)(A), providing that "the court shall not reduce defendant's

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that Congress intended to create. . . . Such a one-way lever would be grossly at odds with Congress's intent. In establishing the guidelines system, Congress made clear that a sentencing judge should take into account aggravating *as well as* mitigating factors") (emphasis in original) (internal citations omitted).

term of imprisonment under 18 U.S.C. § 3582(c) . . . to a term that is less than the minimum of the amended guideline range," was not incorporated into § 3582(c)(2) *until* 2008, well after *Booker*.[10] U.S.S.G. § 1B1.10(b)(2)(A) (2008). Therefore, the Court could not have severed and excised the mandatory provisions in § 3582(c)(2).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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[10] In 2004 when *Booker* was argued, U.S.S.G. § 1B1.10(b) contained no language making amended Guidelines mandatory in § 3582(c)(2) proceedings. The relevant text provided: "In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court *should consider* the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced . . . ." U.S.S.G. § 1B1.10(b)(2)(A) (2004) (emphasis added).

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March 16, 2009

APPENDIX

Nos. 08-2901 & 08-2931

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Derek **CUNNINGHAM** and Norman **THOMAS**,
Defendant-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 04-CR-8889—**Milton I. Shadur**, *Judge*.

ARGUED JANUARY 21, 2009—DECIDED FEBRUARY 4, 2009

Before POSNER, FLAUM, and WOOD, *Circuit Judges*.

FLAUM, *Circuit Judge*. This case presents the consolidated appeals of Derek Cunningham and Norman Thomas. Their appeals arise from the same prosecution and raise the same purely legal issue: whether a district court, in reducing a defendant's sentence pursuant to 18 U.S.C. § 3852(c)(2), has authority under *United States v. Booker*, 543 U.S. 220 (2005) to reduce a defendant's sentence beyond the retroactive Guidelines amendment range. For the reasons explained below, we hold that a district court does not have authority to do so and therefore affirm the judgment of the district court.

I. Background

Because this appeal presents a purely legal question, the facts of defendants' convictions need not be explored at length. Suffice to say, in the original prosecution, co-defendants Thomas and Cunningham both pled guilty to conspiring to distribute crack cocaine in violation of 21 U.S.C. § 846. On January 31, 2006, the district court sentenced Thomas to 108 months in prison and Cunningham to 87 months in prison. Both sentences were at the low end of the advisory Sentencing Guidelines range applicable to the respective defendants.

In June 2008, the defendants filed section 3582(c)(2) motions to reduce their sentences based on the retroactive amendments to the crack cocaine Guidelines. Based on the change in the crack quantities and corresponding offense levels. The defendants thus requested that their sentences be reduced two levels in light of the amendment. However, they also asserted that the district court had the authority to consider granting them further sentence reductions, resulting in terms of imprisonment below their respective amended Guideline ranges. With regard to this second point, defendants argued that the district court had authority to reduce their sentences below the amended Guideline ranges because *Booker* made the Sentencing Guidelines advisory.

On July 17, 2008, the district court reduced the defendants' sentences but declined to descrease their sentences below the two level reduction authorized by the retroactive amendment. The district court held that *Booker* was not implicated because "*Booker* concerns constitutional limitations on *increasing* a

sentence beyond what is considered the prescribed maximum without a jury finding, not, as in this case, to [sic] *decreasing* a sentence. Section 3582(c)(2) concerns only sentence reductions and thus does not implicate *Booker* or the constitutional limitations upon which that decision was premised."

Defendants have appealed.

II. Discussion

We review the district court's determination of questions of law de novo. *United States v. Ryerson*, 545 F.3d 483, 487 (7th Cir. 2008).

Title 18 U.S.C. § 3582(c)(2) provides that

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 944(o) . . . the court may reduce the term of imprisonment, after considering the factors set forth in § 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The policy statements relevant to this case are found in Sentencing Guidelines sections 1B1.10(a)(3) and 1B1.10(b)(2)(A). Section 1B1.10(a)(3) states that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." Section 1B1.10(b)(2)(A) provides that "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the

minimum of the amended guideline range determined under subdivision (1) of this subsection.[1]

The basic question in this case is whether these policy statements regarding section 3582(c)(2) resentencings—first, that section 3582(c)(2) reductions do not constitute full resentencings, and second, that a court shall nor reduce a defendant's imprisonment to less than the minimum of the amended guideline range—conflict with *Booker*'s general rule that the Sentencing Guidelines are advisory. That is, whether or not district courts have the authority, in making section 3582(c)(2) sentence modifications, to treat the amended Guideline range as advisory despite the Commission's policy statements to the contrary.

Defendants advance four arguments to support their contention that a district court can reduce a defendant's sentence beyond the retroactive Guidelines amendment range. First they argue that *Booker* expressly rejected the notion that the Guidelines are advisory in some contexts but mandatory in others. In other words, they disagree that the Guidelines would be advisory during a defendant's initial sentencing but mandatory in section 3582(c)(2) proceedings. Second, and to some degree in the alternative, they argue that the Commission's policy statement themselves are advisory and thus are not truly inconsistent with a below-guidelines sentence. Third, they claim that if the Commission's policy statements were given full

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[1] Section 1B1.10(b)(2)(B) provides an exception for defendants who were originally sentenced to below-Guidelines terms of imprisonment. For such defendants, "a reduction comparably less than the amended guideline range . . . may be appropriate."

effect, they would strip courts of their traditional sentencing discretion by constraining their consideration of the section 3553(a) factors to the extent they are applicable—consideration that is mandated under the terms of section 3582(c)(2). Finally, they argue that since the Supreme Court has held that district courts have discretion to depart from the Guidelines even based on disagreements with the Guideline's policy statements, *see, e.g.*, *Spears v. United States*, ___ U.S. ___, ___ S.Ct. ___, 2009 WL 129044 *2 (Jan. 21, 2009), the enactment of the Guideline amendment and its policy statements cannot strip the sentencing courts of their discretion by mandating the strict application of a two level departure.

The Ninth Circuit adopted many of the defendants' views in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007). In *Hicks*, the Ninth Circuit concluded that limiting the extent of a section 3582(c)(2) reduction to that prescribed by the Sentencing Commission amounts to a mandatory application of the Sentencing Guidelines that is prohibited by *Booker*. While the court conceded that *Booker* itself does not creat the authority for reopening sentencing under section 3582(c)(2), the court reasoned that once such proceedings were initiated, the district court has discretion to impose a non-Guidelines sentence. *Id.* at 1171 ("Because a 'mandatory system is no longer an open choice,' district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2).")(quoting *Booker*, 543 U.S. at 263). The Ninth Circuit also rejected the government's argument that because a § 3582(c)(2) proceeding is not a "full resentencing," but merely a modification of

the defendant's sentence, *Booker* was inapplicable. *See id.* at 1167 ("The dichotomy drawn by the government, where full re-sentencings are performed under an advisory system while 'reduction proceeding' or 'modifications' rely on a mandatory Guideline system, is false. . . .Mandatory Guidelines no longer exist, in this context or in any other.")

The government urges us to decline to follow *Hicks.* They present three main arguments in support of affirming the district court. First, they note that 28 U.S.C. § 944(u) gives the Sentencing Commission the exclusive power to decide under "what circumstances and by what amounts the sentences of prisoners . . . may be reduced." *See* 28 U.S.C. § 944(u); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991)(emphasis omitted) (Congress has given the Sentencing Commission "the unusual and explicit power to decide whether and to what extent its amendments . . . will be given retroactive effect.")(emphasis omitted)(citing 28 U.S.C. § 944(u)). Thus, they reason, the Commission's policy statements that implement the Commission's authorization of retroactive sentence reductions are binding because they are an exercise of that statutory authority. Second, they focus on the Commission's policy statement in U.S.S.G. § 1B1.10(a)(3) which states that under section 3582(c)(2), defendants do not receive "a full resentencing." They cite several pre-*Booker* cases holding, as the Eleventh Circuit did, for example, that section 3582(c)(2) "do[es] not contemplate a full de novo resentencing" and "*all* original sentencing determinations remain unchanged with the sole exceptiopn of the guideline range that has been amended since the original sentencing." *United*

States v. Bravo, 203 F.3d 778, 781 (11th Cir. 2000)(emphasis in original)(internal quotation and citation omitted). Finally, the government argues that *Booker* does not apply to section 3582(c)(2) proceedings because *Booker* does not apply to sentence reductions.

Several recent circuit court decisions support the government's position. *See United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008); *United States v. Dunphy*, ___ F.3d ___, 2009 WL 19139 (4th Cir. Jan. 5, 2009); *United States v. Starks*, ___ F.3d ___, 2009 WL 66115 (8th Cir. Jan. 13, 2009). A number of district courts from around the country have also come to this conclusion. *See United States v. Speights*, 561 F. Supp. 2d 1277, 1281 (S.D. Ala. 2008)(citing eleven other district court decisions from around the country that have held that *Booker* has no impact on section 3582(c)(2) reductions).

In our analysis, the best place to start is *Booker* itself. In *Booker*'s substantive opinion, the Supreme Court held that the federal sentencing system as it then existed, under which the sentencing court rather than the jury found facts that established the mandatory guideline range, violated the Sixth Amendment as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). The constitutional problem that Booker addressed was that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490). The Court found that a sentencing system in which such

judicial fact-finding was mandatory violated the Sixth Amendment.

However, as the district court recognized, in section 3582(c)(2) proceedings, a district court can only *decrease* a defendant's sentence. Thus, the constitutional defect addressed by *Booker* is simply not implicated. Moreover, a section 3582(c)(2) modification is discretionary, even for a defendant whose Guideline range has been retroactively lowered. *See* 18 U.S.C. § 3582(c)(2) (identifying circumstances in which "the court *may* reduce the term of imprisonment")(emphasis added). Thus , to frame a section 3582(c)(2) reduction as a mandatory undertaking that triggers the Sixth Amendment or *Booker* is incorrect.

It is admittedly a bit harder to reconcile the language of *Booker*'s remedial opinion, however. In its remedial portion, *Booker* eliminated the constitutional defect identified above by severing and excising the provisions of the Guidelines that made them mandatory, along with any statutory provisions that depended upon the Guidelines' mandatory nature. *Booker*, 543 U.S. at 245-46. The remedial majority determined that this was what Congress would have intended in light of the court's constitutional holding. *Id.* at 246. The Court went on to state that it did "not see how it was possible" to leave the Guidelines as binding in some cases but not in others. *Id.* at 266. The Court explicitly rejected the government's proposal, which would have "impose[d] mandatory Guidelines-type limits upon a judge's ability to reduce sentences, but it would not impose those limits upon a judge's ability to increase sentences." *Id.* As the Court stated, "[w]e do not

believe that such 'one way lever[s]' are compatible with Congress' intent."

Despite this broad language, we do not believe that the *Booker* remedy renders the limits set by the Sentencing Commission for section 3582(c)(2) proceedings advisory.[2] First, unlike a full sentencing or resentencing, Congress clearly intended section 3582(c)(2) proceedings to be a one way lever. Section 3582(c)(2) allows the district court to leave a sentence alone or reduce it, but it does not permit the district court to increase a sentence. Second, and more generally, while *Booker*'s remedial opinion stated that "we believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others" due to the possible "administrative complexities" of such a system, it seems to us that allowing (or requiring) district courts to essentially conduct a full resentencing upon a section 3582(c)(2) motion would create *more* administrative complexity, not less. *See Dunphy*, 2009 WL 19139 at *5. Finally, *Booker*'s remedial opinion focused on Congressional intent. The text of section 3582(c)(2) makes clear that Congress intended section 3582(c)(2) modifications to comport with the Commission's policy statements, an impossibility if we were to adopt the defendants' position that Booker rendered the Guidelines wholly advisory in the context of sentence modifications (as distinguished from full sentencing proceedings).

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[2] As an initial matter, it bears noting that because section 3582(c)(2) did not cross-reference any provisions excised by *Booker*, and because *Booker* did not directly address section 3582(c)(2) proceedings, section 3582(c)(2) remained intact.

This last point bears elaboration, as it is the most important basis for our decision today. Original sentencing proceedings and sentence modification proceedings are legally distinct from one another. Original proceedings are governed by 18 U.S.C. § 3553 (a statute that was partially excised in *Booker*), while sentence modification proceedings are governed by 18 U.S.C. § 3582(c)(2).[3] Contrary to the defendants' contention, there is no "inherent authority" for a district court to modify a sentence as it pleases; indeed a district court's discretion to modify a sentence is an exception to the statute's general rule that "the court may not modify a term of imprisonment once it has been imposed." *See* 18 U.S.C. § 3582(c). When Congress granted district courts discretion to modify sentences in 3582(c)(2), it explicitly incorporated the Sentencing Commission's policy statements limiting reductions. *See United States v. Walsh*, 26 F.3d 75, 77 (8th Cir. 1994) ("Congress has made the policy statements set forth in Section 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence in this situation."). Thus, the Commission's policy statements should for all intents and purposes be viewed as part of the statute. The policy statements make clear that section 3582(c)(2) proceedings are not full resentencings and may not result in a sentence lower than the amended guideline range (unless the defendant's original sentence was lower than the guideline range). *See* U.S.S.G. §§ 1B1.10(a)(3), 1B1.10(b)(2)(A). This

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[3] This is a point we (and other courts) feel the *Hicks* court failed to appreciate. *See Rhodes*, 549 F.3d at 840-41; *Starks*, 2009 WL 66115 at *3.

limitation of the district court's power is not constitutionally suspect. Having chosen to create a modification mechanism, *Booker* does not require Congress to grant the district courts unfettered discretion in applying it. Indeed, mandatory minimum sentences—which cabin the district courts' discretion with regard to section 3553(a) factors—have been upheld as constitutional. *See Harris v. United States*, 536 U.S. 545 565-68 (2002); *United States v. Franklin*, 547 F.3d 726, 735 (7th Cir. 2008) (rejecting defendant's argument that the district court had authority to depart from the mandatory minimum and consider the factors set forth in 18 U.S.C. § 3553 to impose a lesser sentence)(citing *Chapman v. United States*, 500 U.S. 453 (1991)).

Section 3582(c)(2)'s direction that courts "shall consider the factors in Section 3553(a) to the extent they are applicable" does not undermine our conclusion. It is true that one of the factors in section 3553(a) is the Guidelines range, which *Booker* made advisory. However, section 3582(c)(2) states that a district court considers the section 3553(a) factors in making a reduction "consistent with the applicable policy statements issued by the Sentencing Commission." There need not be a conflict: the statute can be viewed as requiring district courts to consider the section 3553(a) factors in deciding whether and to what extent to grant a sentence reduction, but only within the limits of the applicable policy statements. *See Dunphy*, 2009 WL 19139 at *7. (In this case, the limit is the bottom of the amended Guideline range, as stated in U.S.S.G. § 1B1.10.)

In concluding that district courts do not have authority to grant sentence reductions pursuant to section 3582(c)(2) below the amended Guideline range, we are mindful of two final points. As the government points out, *Booker* has not been made a basis for post-conviction collateral review under 28 U.S.C. § 2255. It would thus be incongruous if courts interpreted section 3582(c)(2), which provides for more limited relief than section 2255, as triggering a full *Booker* resentencing. On a related note, *Booker* does not apply to the scores of defendants whose sentences were final when *Booker* was handed down. It would be unfair to allow a full *Booker* resentencing to only a subset of defendants whose sentences were lowered by a retroactive amendment.

III. Conclusion

We side with the majority of courts and hold that district courts, in reducing a defendant's sentence pursuant to 18 U.S.C. § 3582(c)(2), do not have authority to reduce the defendant's sentence beyond the retroactive Guideline's amendment range. We thus AFFIRM the judgment of the district court.

February 4, 2009

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v.

Norman THOMAS and Derek CUNNINGHAM, Defendants.

Nos. 04 CR 889-2, 04 CR 889-3

July 17, 2008

MEMORANDUM OPINION & ORDER

MILTON I. SHADUR, Senior District Judge.

This Court's July 7, 2008 memorandum opinion and order ("Opinion") addressed and resolved the motion filed by one of the defendants in this case, Norman Cole ("Cole"), seeking to invoke the provisions of 18 U.S.C. § 3582(c)(2)[1] to obtain a reduction in his crack-cocaine-related sentence. That resolution of Cole's motion did not compel a choice between conflicting readings that had emanated from some other courts as to the permissible scope of reexamination of such a defendant's original sentence, because Cole's plea agreement had prescribed his sentence under Fed.R.Crim.P. ("Rule") 11(c)(1)(C) in terms such that his revised custodial

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[1] All further references to Title 18's provisions will simply take the form "Section-."

sentence—which again had to be grounded in the contract that had been created by that plea agreement was preordained.

Now Cole's codefendants Norman Thomas ("Thomas") and Derek Cunningham ("Cunningham") have filed like motions for reduction of their original custodial sentences. Neither of their original plea agreements had contained the same Rule 11(c)(1)(C) grounding as Cole's, so this Court is now faced with the need to choose between the earlier-mentioned differing views as to the application of Section 3582(c)(2). In that respect, even though neither of the polar-opposite decisions by this Court's colleagues Honorable Matthew Kennelly (embodied in his April 28, 2008 opinion in *United States v. Witherspoon*, 02 CR 491) and Honorable Charles Kocoras (set out in his June 30, 2008 opinion in *United States v. Shelby*, 95 CR 69, 2008 U.S. Dist. LEXIS 50596) is of course binding on this Court (as no district court opinion is), they provide useful articulations of the analyses involved in arriving at such different destinations.

On that score this Court sees no need "to gild refined gold, to paint the lily, to throw a perfume on the violet."[2] It finds both the reasoning and the result of Judge Kennelly's *Witherspoon* opinion fully persuasive—and because that opinion is (perhaps inexplicably) not available on either Westlaw or LEXIS, this opinion attaches and adopts the Kennelly opinion in its entirety.[3]

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[2] William Shakespeare, *King John*, act 4, sc. 2, lines 11-12.

[3] Indeed, given this Court's view as to the persuasiveness of the *Witherspoon* opinion and its entitlement to broader circulation,

Under the circumstances applicable to Thomas and Cunningham (as was the case with Cole as well), there is no need for an evidentiary hearing. Each of the two was originally sentenced at the low end of his range prescribed by the then-applicable Sentencing Guidelines, and in each case a sentence at the low end of the now-revised Guidelines is plainly called for by the provisions of Section 3553(a)—particularly, though not solely, the determination that such a low-end sentence is sufficient, but not greater than necessary, to comply with the purposes set forth in Section 3553(a)(2). Accordingly Thomas' custodial sentence is reduced to 87 months and Cunningham's is reduced to 70 months, with all other provisions of each sentence remaining the same.

APPENDIX

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge: Matthew F. Kennelly

CASE NUMBER: 02 CR 491

DATE: 4/28/2008

CASE TITLE: United States v. Pharoo Witherspoon

DOCKET ENTRY TEXT: For the reasons stated below, the Court Grants defendant's motion for retroactive application and his motion to reduce sentence and will, by separate order, reduce the prison term previously imposed upon defendant to a term of 87 months from the original term of 108

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this Court has opted to publish this opinion—not at all for itself, but rather to provide a wider audience with access to that view.

months. The Court declines, for the reasons stated below, defendant's request for a full resentencing.

[For futher details see text below.]

Docketing to mail notices.

Pharoo Witherspoon has moved pursuant to 18 U.S.C. § 3582(c)(2) to reduce his sentence, as a result of recent amendments to Sentencing Guideline § 2D1.1. The Court grants his motion and reduces Mr. Witherspoon's sentence from 108 months to 87 months but declines his request to conduct a full resentencing for the reasons stated below.

Mr. Witherspoon pled guilty to a charge of distributing crack cocaine. Under the Sentencing Guidelines, his criminal history category was I and his offense level was 31, which produced a Guidelines sentencing range of 108 to 135 months. In March 2003, the Court imposed a 108 month prison term, the low end of the range.

At the time the Court sentenced Mr. Witherspoon, it imposed the sentence based on the common understanding that compliance with the terms of the Sentencing Guidelines was mandatory. Following *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), however, the Guidelines are no longer a mandatory sentencing regime, and the applicable Guidelines sentencing range is now just one of several factors the Court must consider in imposing sentence.

In November 2007, the Sentencing Commission amended Guideline § 2D1.1, providing for reduced offense levels for crack cocaine offenses. In December 2007, the Commission made the change retroactive. At the same time, the Commission issued a revised

version of Guideline § 1B1.10, which concerns situations in which a defendant's sentence may be reduced due to a post-sentencing change in the applicable Guideline. As a result of the revision of Guideline § 2D1.1, Mr. Witherspoon's offense level is now 29, and the Guideline range is 87 to 108 months.

Mr. Witherspoon has moved to reduce his sentence, arguing that he should get, at a minimum, a reduction to 87 months, the low end of the now-applicable Guideline range. He also argues, however, that the Court should conduct a full, post-*Booker* type resentencing and impose a sentence lower than 87 months. The government does not oppose a reduction of Mr. Witherspoon's sentence to 87 months but argues that he is not entitled to a full resentencing.

The general rule is that a Court may not revise a sentence after imposing it. 18 U.S.C. § 3582(c). The exceptions to this rule are very limited. They include the authority granted by Federal Rule of Criminal Procedure 35; certain authority granted to the Bureau of Prisons; and reductions based upon subsequently-reduced Guidelines sentencing ranges. *See id.* § 3582(c)(1-2). The only authority upon which Mr. Witherspoon may obtain a reduction is section 3582(c)(2), which provides:

> In a case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set

> forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2).

In this case, the "applicable policy statement[ ] issued by the Sentencing Commission"is the amended version of the Guideline § 1B1.10. As relevant in this case, § 1B1.10(b) requires the court to determine the amended guideline range that would have applied if the recent amendment to Guideline § 2D1.1 had been in effect at the time of sentencing, and it provides that with an inapplicable exception, "the court shall not reduce the defendant's term of imprisonment ... to a term that is less than the minimum of the amended guideline range" thus determined. Guideline § 1B1.10(b)(1) & (2)(A). In addition, Guideline § 1B1.10(a) states that proceedings under § 3582(c)(2) and Guideline § 1B1.10 "do not constitute a full resentencing of the defendant." *Id.* § B1.10(a)(3).

Despite the terms of § 3582(c)(2) and Guideline § 1B1.10(a)(3), Mr. Witherspoon seeks a resentencing based on the standards that would have applied had *Booker* been decided before he was sentenced in the first instance—namely, resentencing under an advisory Guidelines regime as opposed to the mandatory regime then in place. The Court rejects this request. Section 3582(c) generally prohibits resentencing but allows for exceptions. Those exceptions cannot be read more broadly than Congress intended them. Congress made Guideline § 1B1.10's policy statements the applicable law for determining whether and to what extent a court may reduce a sentence after a provision of the Guidelines

is amended retroactively. *See, e.g., United States v. Walsh*, 26 F.3d 75, 77 (8th Cir. 1994). The Seventh Circuit has held that a proceeding under § 3582(c)(2) is "not a do-over of the original sentencing," *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999)-in other words, it is not a full resentencing. For these reasons, a court is prohibited from making a reduction below the amended Guideline range, except in certain narrow circumstances contemplated in Guideline § 1B1.10(b)(2)(B) that do not exist in Mr. Witherspoon's case. *See, e.g., United States v. Hasan*, 245 F.3d 682, 685-86 (8th Cir.2001) (en banc).

The Court also disagrees with Mr. Witherspoon's contention that the Sentencing Commission's limitation on sentence reductions resulting from the changes to the crack cocaine guidelines is inconsistent with section 3582(c)(2). Mr. Witherspoon's argument, in essence, goes as follows: section 3582(c)(2) expressly requires "consider[ation of] the factors set forth in section 3553(a) to the extent that they are applicable"; that, in turn, requires consideration of the "unwarranted sentence disparities" between persons convicted of powder cocaine offenses and those convicted of crack cocaine offenses that led to the recent amendments to Guideline § 2D1.1; the Commission concededly did not eliminate those disparities in the recent amendments; and thus a limitation on reductions in a case like this one to the low end of the revised Guideline range effectively prevents a court from "considering the factors set forth in section 3553(a)" that might warrant a still-lower sentence. Though this argument has some logical appeal, the Court believes that the statute's reference to the section 3553(a) factors "to the extent that they are

applicable" is intended to express a court's authority to consider those factors in determining whether a reduction is warranted, and how much of a reduction is warranted within the limitations imposed by the Sentencing Commission pursuant to the authority delegated by Congress. Neither section 3582(c)(2) nor Guideline § 1B1.10 *entitles* a defendant to a sentence reduction when the applicable Guideline range is reduced retroactively; the statute specifically states that a judge "may reduce" the sentence, not that a judge must reduce the sentence. *See Tidwell*, 178 F.3d at 949 (sentence reduction under § 3582(c) is discretionary). The section 3553(a) factors inform a court's exercise of its discretion in this regard. The statute's text does not suggest that by referring to section 3553(a), Congress intended to allow judges to go beyond what the Sentencing Commission permits in reducing a sentence; indeed, the statute specifically says just the opposite when it requires reductions to be "consistent with" the Sentencing Commission's policy statements.

Finally, the Court disagrees with Mr. Witherspoon's contention that application of section 3582(c)(2)'s limitations on the nature and degree of a sentence reduction run afoul of *Booker*. *Booker* concerns constitutional limitations on *increasing* a sentence beyond what is considered the prescribed maximum without a jury finding, not, as in this case, to *decreasing* a sentence. Section 3582(c)(2) concerns only sentence reductions and thus does not implicate *Booker* or the constitutional limitations upon which that decision was premised.

For these reasons, the Court grants defendant's motion to reduce sentence but denies his request for a

full resentencing. The sentence is reduced to provide for a term of imprisonment of 87 months in place of the 108 month term originally imposed; all other provisions of the sentence remain as-is.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-2901

UNITED STATES OF AMERIC

Plaintiff-Appellee,

v.

DEREK CUNNINGHAM,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 04 CR 889 – Shadur, Milton I., *Senior Judge*.

BRIEF OF THE UNITED STATES

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* * *

STATEMENT OF FACTS

Offense Conduct

The offense conduct is not disputed and was summarized in the defendant's plea agreement. R. 93. From around September 2003 through December 2003, the defendant conspired with his co-defendants, Norman Cole and Norman Thomas, to possess with intent to distribute and to distribute crack cocaine. R. 93 at 2-3. The plea agreement detailed a specific instance in which co-defendants Norman Cole and Norman Thomas arranged with the defendant to distribute around 246 grams of crack cocaine in October 2003. R. 93 at 3.

Initial Sentencing

The plea agreeement's Sentencing Guidelines calculations were adopted by the district court at sentencing. R. 93 at 3-4; see 1/31/06 Tr. at 60. Specifically, the defendant's base offense level was 34 due to an applicable crack quantity of between 150 grams to 500 grams; subtract 2 levels for qualifying for the 'safety valve,' U.S.S.G. § 2D1.1(b)(7); and subtract 3 levels for timely acceptance of responsibility, yielding a total offense level of 29. R. 93 at 3-4. The defendant was in criminal history category I. R. 93 at 4. The resulting advisory Guidelines range was 87 to 108 months of imprisonment. On January 31, 2006, the district court sentenced the defendant to 87 months' imprisonment. R. 116.

Section 3582(c)(2) Motion

On June 27, 2008, the defendant filed a § 3582(c)(2) motion to reduce his sentence based on the retroactive amendments to the crack cocaine

Guidelines. R. 166. Based on the change in the crack quantities and corresponding offense levels, the defendant's base offense level was reduced from level 34 to level 32, and his lowered total adjusted offense level was 27, and with a criminal history category of I, the new range was 70 to 87 months' imprisonment. App. 17, R. 182. On July 17, 2008, the district court reduced the defendant's sentence, but rejected the defendant's request to reduce the sentence below the two offense-level reduction authorized by the Sentencing Commission. R. 179, 182, App. 17 (order entered on docket on July 24, 2008). In a written opinion, the district court incorporated a detailed analysis by another district judge on the same issue, in which that judge explained that *Booker* did not authorize a reduction beyond that authorized by the Sentencing Commission pursuant to its statutory authority. R. 179, App. 9-14 (reported at *United States v. Thomas*, 566 F. Supp. 2d 830 (N.D. Ill. 2008)).

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No. 08-1149

In the Supreme Court of the United States

DEREK CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 7-15) that this Court should grant certiorari to resolve the circuit conflict on the question whether the holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c). This Court has received several other petitions raising the same basic claim. As the government has explained in its brief in opposition to the first of those petitions, see *Rhodes* v. *United States*, No. 08-8318 (filed Mar. 27, 2009), cert. denied (Apr. 27, 2009), although the courts of appeals are divided on this issue, this Court's review of that issue is not currently warranted.[1] This Court recently

[1] We have served petitioner with a copy of the government's brief in opposition in *Rhodes*.

denied certiorari in *Rhodes* and in two other cases presenting the same question. See *Dunphy* v. *United States*, No. 08-1185 (May 18, 2009); *Melvin* v. *United States*, No. 08-8664 (May 18, 2009). There is no reason for a different result here.

Seven of the eight courts of appeals to consider the issue have held (correctly, in the government's view) that *Booker* does not apply in sentence modification proceedings under Section 3582(c). See U.S. Br. in Opp. at 15-16, *Rhodes*, *supra* (No. 08-8318) (citing cases); see also *United States* v. *Doe*, No. 08-3968, 2009 WL 1151939 (3d Cir. Apr. 30, 2009). Although the Ninth Circuit's decision in *United States* v. *Hicks*, 472 F.3d 1167 (2007), is inconsistent with these decisions, *Hicks* is the subject of a pending government appeal in *United States* v. *Fox*, No. 08-30445 (9th Cir. filed Nov. 21, 2008). On March 13, 2009, the government filed its opening brief in the Ninth Circuit in *Fox*, and on April 13, 2009, the government filed a petition for an initial en banc review, which is currently pending before a merits panel, urging the Ninth Circuit to overrule its decision in *Hicks*. If the Ninth Circuit agrees that *Hicks* should be overruled, the current circuit conflict will disappear. If the court of appeals rejects the government's argument and affirms *Hicks*, the government would retain the option of seeking this Court's review at that time. The pendency of the proceedings in *Fox*, therefore, renders this Court's review of the issue premature.[2]

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[2] The government waives any further response to the petition unless this Court requests otherwise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ELENA KAGAN
Solicitor General

MAY 2009